

Internal Revenue Service

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Department of the Treasury
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Person To Contact:
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Telephone Number:

Refer Reply To:
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Date:
December 08, 2011

Legend:

Spouse 1 =
Spouse 2 =
Agreement =
State =
Trust =
Cite 1 =

Cite 2 =

Dear :

This letter responds to your authorized representative's letter of June 7, 2011, requesting rulings on the estate tax consequences of the proposed transaction.

The facts submitted are as follows: Spouse 1 and Spouse 2 are married to each other and hold property as tenants by the entirety (Property). They propose to execute an agreement (Agreement) to govern the disposition of Property on the death of each of the spouses. The Agreement will provide, in Article 5, that on the death of the first spouse to die, one half of the value of Property must be held in trust (Trust) during the survivor's (Survivor's) life. The Survivor may exchange his or her own separate property for the portion of Property to be held in trust. The Survivor will receive the other half of Property outright.

The Trust, in Article II, will provide for the Survivor to receive the trust income. If the Survivor: (i) does not remarry, or (ii) remarries and certain conditions are met, he or she may receive principal in the trustee's absolute discretion. The remaining principal will be distributed to designated remaindermen at the Survivor's death.

You have asked for several rulings under chapter 11, and specifically, whether Rev. Rul. 71-51, 1971-1 C.B. 274, applies to the facts of this case.

Under State law, a tenancy by the entirety is presumed to exist when: (i) there is joint ownership and control of the property; (ii) identical interests originate in the same instrument at the same time; (iii) the parties are married when the property is so titled; and (iv) there is survivorship. Under the survivorship criterion, on the death of the first spouse to die, the property must vest outright and absolutely in the survivor. Cite 1. However, spouses may convert the tenancy by the entirety to another form of ownership by executing a binding contract to change their legal rights and interests. The revision terminates the tenancy by the entirety that existed prior to the binding contract. The property subject to the contract remains nontestamentary in character and, in effect, passes by operation of law upon the death of the first spouse to die. Cite 2.

Section 2040(a) provides, in part, that the value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants with right of survivorship by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth.

Section 2040(b)(1) provides that notwithstanding subsection (a), in the case of any qualified joint interest, the value included in the gross estate with respect to such interest by reason of this section is one-half of the value of such qualified joint interest.

Section 2040(b)(2) provides that the term "qualified joint interest" means any interest in property held by the decedent and the decedent's spouse as — (A) tenants by the entirety, or (B) joint tenants with right of survivorship, but only if the decedent and the spouse of the decedent are the only joint tenants.

Section 2056(a) provides that, for purposes of the estate tax, the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

Rev. Rul. 71-51, 1971-1 C.B. 274, considers a situation in which spouses held property as joint tenants with right of survivorship. They executed joint and mutual wills providing that all property at the time of the death of either was to be held by the survivor for life with the right to the income. On the survivor's death, the remainder interest in the property was to be distributed to their children. At issue was whether, in view of the outstanding joint and mutual will, the interest in property passing to the surviving wife on the death of her husband qualified for the marital deduction.

Rev. Rul. 71-51 states that, under the general rule relating to joint tenancies, a surviving joint tenant does not take the cotenant's interest as a successor, but takes it by right under the instrument creating the joint tenancy. The joint tenancy property passed outside of the will, and the survivorship interest in the jointly held property ripened into absolute ownership on the death of the first spouse to die. The spouses' testamentary dispositions could not affect the survivor's absolute right to the joint tenancy property. Estate of Awtry v. Commissioner, 221 F.2d 749 (8th Cir. 1955).

The facts of the proposed transaction are substantially different from the facts of Rev. Rul. 71-51. Unlike the testamentary joint and mutual will of Rev. Rul. 71-15, the Agreement and consequent Trust constitute a binding contract creating rights and interests that supersede and extinguish those of the tenancy by the entirety. At the death of the first spouse to die, the Property is nontestamentary in character and passes in accordance with State law. Thus, Rev. Rul. 71-51 is not applicable. For this reason, we are providing no further comment on the tax consequences of the transaction.

Except as specifically ruled herein, we express no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code. This ruling is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Leslie H. Finlow
Senior Technician Reviewer, Branch 4
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures
Copy for § 6110 purposes